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No. 76-399

In the Supreme Court of the United States

OCTOBER TERM, 1976

KENNETH M. CRUMPLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of unlawfully possessing unregistered and improperly identified firearms, in violation of 26 U.S.C. 5861 (d) and (i) and 5871, and of unlawfully storing explosive materials, in violation of 18 U.S.C. 842(j). He was sentenced to three years' imprisonment on the firearms counts and one year's imprisonment on the explosives count, the sentences to run concurrently, and to fines totalling $9,000. The court of appeals affirmed (Pet. App. A).

Petitioner contends (1) that the search that disclosed the firearms and explosives was unlawful because the underlying warrant was partially based on a prior search that the court of appeals had held to be unlawful in another case; (2) that his possession of the firearms and explosives

was not unlawful because they had been issued to him while he was on active duty with the National Guard; and (3) that the case report of an agent-witness was withheld from him in violation of 18 U.S.C. 3500.

1. The firearms and explosives were found and seized during a search of petitioner's business premises made pursuant to warrant by federal agents. Six months earlier local police officers had entered the premises because they believed that a burglary was in progress and had found and seized numerous firearms and other similar devices. In a subsequent federal prosecution for possession of unregistered firearms, petitioner's motion to suppress was granted when the government failed to produce the police officers as witnesses to establish that the seized firearms had been in plain view. *United States* v. *Crumpler*, 507 F. 2d 624 (C.A. 5).

The search in the instant case followed an explosion in a city-owned trash container located behind petitioner's premises.[1] Local fire officials examined the contents of the container and found the barrel of a revolver and ignition fuses used in military hand grenades. Petitioner admitted to a fire marshal that he had thrown the revolver barrel into the container. These facts, as well as the facts pertaining to the earlier seizure, were set forth in the affidavit in support of the application for the search warrant.

Both courts below correctly held that, even after striking the statements regarding the earlier seizure, the remaining averments in the affidavit—concerning the trash container explosion, the hand grenade fuses, and petitioner's admission to the fire marshal—were sufficient to

[1]See the July 17, 1975 Memorandum and Order of the district court (reproduced at pages 1-12 of the government's brief on appeal, a copy of which we are lodging with the Clerk of this Court) denying petitioner's pretrial motion to suppress.

establish probable cause and to justify issuance of the search warrant (Pet. App. 2A). This essentially factual determination does not merit further review by this Court.[2]

2. Petitioner testified at trial that in 1962, in his capacity as a Company Commander in the National Guard, he had confiscated the items that were the subject of the indictment and had "stored" them at his place of business for eleven years to keep other people from using them.[3] Petitioner claims that that testimony established as a matter of law that his possession of the items was lawful.

Petitioner cites no statute or regulation that would even arguably have authorized his conduct. In fact he possessed no lawful authority to remove the items from government premises, and a National Guard officer testified to this effect (Pet. App. 4A). Even assuming that this was a matter for the trier of fact, the jury found against petitioner, and there is no reason to disturb that result.

3. The district court correctly ruled that Agent Mozey's case report was not producible under the Jencks Act following Mozey's testimony. That report, which the court inspected *in camera*, consisted of summaries of the expected testimony of other witnesses. As such the report was hearsay as to the agent and did not "relate to the subject matter of [his] testimony." See 18 U.S.C. 3500(c).

[2]While it is unnecessary for the Court to reach the question in this case, it is our position that the deterrent purposes of the exclusionary rule are not served by extending its application to the fruits of an illegal search when the crime of which a defendant stands charged occurred after the allegedly unlawful search.

[3]See the government's brief on appeal, pp. 20-21.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1977.

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